April 17, 2013

Via Electronic Submission

Ms. Melissa Jurgens
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: ***Comments on CFTC Staff Public Roundtable to Discuss Dodd-Frank End-User Issues Held on April 3, 2014***

Dear Ms. Jurgens:

IntercontinentalExchange, Inc. ("ICE") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") Public Roundtable on April 3, 2014 ("Roundtable"). As background, ICE operates regulated derivatives exchanges and clearing houses in the United States, Europe, Canada and Singapore. As the operator of U.S. and international exchanges, trade repositories and a swap execution facility that list both OTC and futures markets, ICE has a practical perspective of the implications of the changes to Regulation 1.35 and inclusion of trade options within the proposed position limits for derivatives (the "Proposal" or "Proposed Rules").

Executive Summary

- The Commission's modifications to Part 1.35 requiring all participants on a SEF or DCM to record all pre-execution trade information are unnecessary and duplicative;
- This requirement serves as a large surtax on exchange transactions and causes end users to take transactions away from Swap Execution Facilities or Designated Contract Markets, defeating the Dodd/Frank Wall Street Financial Reform and Consumer Protection Act's ("Dodd/Frank") transparency objectives;
- The Commission should remove Trade Options from the definition of physical-delivery Referenced Contract and exempt Trade Options from the Proposed Rules.

Panel 1: Changes to Part 1.35, records of cash commodity, futures and options transactions

The modifications to part 1.35 require recordkeeping for swaps transactions. While most of these changes conform to Dodd-Frank, one change goes beyond the remit of a technical rule change. In part 1.35, the Commission requires all members of Designated Contract Markets

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(DCM) and Swap Execution Facilities (SEFs) to keep records of all oral communications that lead to the execution of a commodity interest (i.e., all agreements, contracts and transactions within the Commission's jurisdiction) or cash commodity transaction. The regulation covers "all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of transactions in a commodity interest or cash commodity, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media." These transaction records must be separately maintained and identifiable by counterparty. The changes require this level of documentation whether the transaction is executed by a swap dealer, major swap participant or an end user. Indeed, the new regulation covers all non-intermediated traders with direct access to a trading platform, whether a SEF or DCM, whether the instrument is a futures contract or a swap, because they are "participants" and thus within the meaning of the term "member".

According to the Commission, the rule is intended to promote "regulatory parity," as the Commission enacted a similar rule for swap dealers ("SDs") and major swap participants ("MSPs"). [1] However, it is worth noting that the Commission in its proposed rule regarding reporting and recordkeeping requirements for SDs and MSPs states that the rule "would not establish an affirmative new requirement to create recordings of all telephone conversations if the complete audit trail requirement can be met through other means, such as electronic messaging or trading."[2] In contrast, this rule creates new obligations on almost all market participants. As the Commission states: "[t]he proposed regulation is primarily a recordkeeping requirement, which will obligate those firms that do not already do so to tape the telephone lines of their traders and sales forces." [3] This increased obligation is having a large impact on the current market. For example, if an end user decides to trade on a SEF, the end user, as a participant on the SEF (defined by the CFTC as a member) is required to record all oral and written communications. It is not clear what conversations would be excluded from the recording requirements. Note that this end user does not incur this cost if it negotiates a bilateral deal with a swap dealer or major swap participant. In that case, the recordkeeping obligation falls upon the swap dealer or major swap participant.

Thus, as currently written, the Commission's regulations have created a clear bias against trading on a SEF by adding this obligation to SEF participants. Given that SEFs are the cornerstone to the Commission's efforts to increase transparency in the swaps markets, adding this surtax directly contradicts the Commission's goals. In addition, every transaction on a SEF

[1] 75 Fed. Reg. 76,666 (Dec. 9, 2010) (Proposed regulation 23.202(a)(1) would require "[e]ach swap dealer and major swap participant [to] make and keep pre-execution trade information, including, at a minimum, records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media").
[2] Id. at 76,668.
[3] 76 Fed. Reg. 33066 at 33079 (June 7, 2011).

is electronically recorded and kept for at least five years. Therefore, placing these requirements on a firm that is not intermediating customer transactions is duplicative and unnecessary. Indeed, the Commission seems to have acknowledged as much when it asked for comments on "the potential costs and benefits of requiring **registrants** to record and maintain oral communications as provided in the proposed rules". Balancing the increased trading cost, the decreased transparency, and duplicative burdens against the Commission's stated benefit of an easier enforcement action; the Commission's cost/benefit analysis is lacking.

Absent revisions to Regulation 1.35, one way the Commission could address customer and end-user issues would be to remove the term "member" in the regulation, and insert the congressional definition provided in CEA Section 4(g)(a), which strictly applies the record-keeping regulations to "FCMs, IBs, floor brokers, and floor trader." Such a revision would be consistent with previous CFTC statements and the CEA language on this topic.[4] When the Division of Market Oversight ("DMO") referred to "members" in its 2009 DMO Advisory Letter, the DMO was substituting "members" for the terms "floor brokers and floor traders" under Section 4(g)(a) of the CEA and the recordkeeping requirement of "members" in the 2009 DMO Advisory Letter was pertaining to records for "the transactions and positions of the customer thereof." As such, ICE believes that applying the Commission's Regulation 1.35 to impose recordkeeping requirements on commercial end-user participants as "members" of SEFs, when that commercial end-user is trading for its own account and not for any customer, was never intended by the 2009 DMO Advisory Letter. Accordingly, we urge the Commission to remove the term "members" in Regulation 1.35 and replace it with the statutory terms in Section 4(g)(a) of the CEA, namely "floor traders and floor brokers."

Alternatively, the Commission could clarify the definition of "member" as applicable to Regulation 1.35 in a manner consistent with congressional intent and prior CFTC staff precedent. Prior to the December 2012 amendments to Regulation 1.35 the Commission has always applied the record keeping requirements to those that execute customer orders and provide a fiduciary

[4] As noted in the Division of Market Oversight's "Advisory for Futures Commission Merchants, Introducing Brokers, and Members of a Contract Market over Compliance with Recordkeeping Requirements," dated February 5, 2009 ("2009 DMO Advisory Letter"), "The Commodity Exchange Act ("ACT") and Commission regulations pertaining to recordkeeping impose requirements for recording information and maintaining records relating to the business of all FCMs, IBs and members." In addition, section 4(g)(a) of the Act, 7 U.S.C. §6(g)(a) (2002), provides generally that FCMs, IBs, floor brokers, and floor traders shall make, keep, and hold open for inspection "…such reports as are required by the Commission regarding the transactions and positions of such person, and the transactions and positions of the customer thereof, in commodities for future delivery on any board of trade in the United States or elsewhere." Sections 4g(b) through (d) of the Act, 7 U.S.C. §§6g(b)-(d) (2002), further provide that: registered entities, including designated contract markets, are required to "maintain daily records"; floor brokers, IBs, and FCMs are required to "maintain daily records for each customer in such manner and form as to be identifiable with the trades referred to in subsection (b)…"; and "daily trading records shall be maintained in a form suitable to the Commission for such period as may be required by the Commission." (Emphasis added.)

duty to customers. Amendments to Regulation 1.35 in December 1948, June 1963, September 1971 and the February 2009 DMO Advisory (see attached) all place the record keeping burden strictly on those handling or on the opposing side of customer order exactions. The record keeping burden was never inclusive of the customer and should not now be expanded. Revising or clarifying this definition would ensure that the congressional historic intent of Regulation 1.35 would be rightly placed on fiduciaries without unduly burdening end-users and customers by forcing them to record all written or electronic communications. Furthermore, such a revision could be accomplished by explicitly stating in the applicable Commission regulations that:

> "A member of a DCM or a SEF that is not registered with the Commission and not required to be registered with the Commission in any capacity shall satisfy the recordkeeping requirements of the CEA and recordkeeping rule, order or regulation under the CEA by maintaining a written record of each transaction in a contract for future delivery, option on a future, swap, swaption, trade option, or related cash or forward transactions. The written record shall be sufficient if it includes the final agreement between the parties and the material economic terms of the transaction and is identifiable and searchable by transaction."[5]

Finally, adding the recordkeeping requirements to all SEF participants is a substantial change to existing practices and massive increase in costs to current swaps participants. Thus, this change should be the subject of a separate rulemaking, not added to a rule intended to conform changes.

Panel: 2: Embedded Volumetric Optionality

The Commission proposes to subject Trade Options to position limits and considers Trade Options to be physical-delivery Referenced Contracts. ICE requests that the Commission exclude trade options from the definition of a Referenced Contract. Trade Options are commercial merchandising transactions done by companies in the normal course of business. They are not in the nature of speculative transactions and do not lend themselves to market manipulation. As such, ICE believes the Commission has an obligation to consider carefully the benefits and associated costs with any rulemaking in light of applicable statutory directives. Any rulemaking addressing position limits must account for the complexity of the products regulated and the tangible benefit of the regulation and be cost efficient. Trade Options are complex instruments which would require great expense to monitor and aggregate into position limits. Most Trade Options are not currently modeled in companies' risk management systems and the expense of compliance with the requirement would be great. There is little tangible benefit to subjecting Trade Options to position limits and no detrimental consequences by not including them in the definition of Referenced Contracts. Given these realities, our view is that including Trade Options in the definition of Referenced Contract would be costly and unnecessary.

[5] See Section 353 of H.R. 4413 approved by the House Agriculture Committee on April 9, 2014.

It is also important to consider that the Commission currently does not have data on the open interest or deliverable supply estimates of Trade Options and thus cannot assess how the proposed spot and non-spot month limits would impact Trade Options. Due to the depth of variation between Trade Options it is extremely difficult to assess the open interest or deliverable supply estimates. Additionally, data on Trade Options was not considered by the Commission when setting levels for non-spot month limits, which could adversely impact market participants who hold positions in both physically-settled contracts and Trade Options. The 2011 position limit rule also did not explain or consider the consequences of treating commodity Trade Options as Referenced Contracts subject to speculative position limits, nor did it suggest how subjecting physical supply option contracts to position limits would be feasible. The inclusion of Trade Options could result in long-term deals counting toward the non-spot month limits, making it difficult, if not impossible for a commercial market participant to stay below the non-spot month limits. In addition, implementing a position limits compliance program that includes commodity Trade Options would be particularly challenging because of, among other things, the difficulty many market participants have had in distinguishing between Trade Options, forwards, and swaps.

Lastly, if the Commission considers Trade Options to be physical-delivery Referenced Contracts, holding a Trade Option prohibits market participants from availing themselves of the Conditional Limit on cash-settled contracts. This would be a drastic change from the current Conditional Limit exemption. Presently, physically-settled contracts are solely defined as physically-settled futures contracts. Modifying this definition will limit market participant's ability to hedge their risks and reduce spot month liquidity.

In conclusion, ICE requests that the Commission remove Trade Options from the definition of physical-delivery Referenced Contract and exempt Trade Options from the Proposed Rules. Thank you for the opportunity to comment on this Roundtable.

Sincerely,

Kara Dutta
IntercontinentalExchange